No. 80-1768

In the Supreme Court of the United States

October Term, 1980

THOMAS LANCI,
Petitioner,

vs.

THE STATE OF OHIO,
Respondent

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ON PETITION FOR WRIT OF CERTIORARI
TO THE EIGHTH DISTRICT COURT OF APPEALS
FOR CUYAHOGA COUNTY, OHIO

PETITIONER'S REPLY

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The State's counter-statement of the facts in this particular cause contains more than the usual number of misstatements one routinely finds in Briefs filed by this prosecutor's office. While these gross distortions, in most instances, bear on critical factual issues in the case, even if the State's assertions as to what the *evidence* was are fully credited, our arguments would in no way be diluted or rendered any less persuasive. Indeed, the real reason the State's Brief is so over-loaded with purported "facts" emphasizes the almost total lack of depth in their arguments.

I

Under its first *Reason for Denying The Writ*, the State argues that "some" of the evidence admitted *substantively* against this petitioner was based solely on the Organized Crime charge. This charge had been predicated on an unconstitutional statute. In any event, the trial court entered a judgment of acquittal *after* having required petitioner to present evidence against that charge as well. Yet, despite this critical concession, the State still makes the absolutely ridiculous argument that the jury's consideration of this evidence as substantive proof "inured" to Lanci's benefit. At least this much is certain, the State's argument is ridiculous *unless* the State is arguing (and such is possible given their reference to the trial judge's obligation to construe a statute to save it from con-

stitutional infirmities where possible, *[Brief of Respondent,* p. 13]), that no prejudice is ever possible from this pattern of events. Logic, on the other hand, supports *only* the conclusion that prejudice occurred here *and* this petitioner was victimized thereby.

II

The State's consistency argument truly deserves to be labelled sophomoric. For rather than come to grips with the salient issues as postured by our contentions, we are told how long it has been the law in Ohio that there " 'need not be consistency between verdicts on separate counts of a criminal indictment' " *(id.,* at 14). For our part, the apt questions that emerge here, of course, simply cannot be resolved on such a simplistic analysis as offered by the State. Rather, what was, and is, required is an analysis that effectively deals with the idea that this jury found *Thomas Lanci not quilty of participating in the arson* that caused the death of Danny Greene that had indisputably been caused by the *very arson* Thomas Lanci was acquitted on.

III

What the State seems to be arguing, as their *Third Reason,* is that when it offers as *substantive proof* certain evidence, valid defense objections to such evidence simply do not reach *any,* and certainly not *all,* possible collateral purposes for which such evidence might have been admissible. Thus, it is reasoned that (regardless of how sophisticated) where the appellate court can divine any such purpose, not only can it be imputed to the trial judge as to his reasons for admitting such evidence, but the defendant can be penalized for the lack of instructions limiting the evidence to such purposes by attributing the resulting flaw in his conviction to his defense counsel.

What counsel obviously overlooks is that it is simply "unfair for a reviewing court to consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at trial," *United States v. Check,* 582 F.2d 668, 683 (2d Cir. 1978). Or, to state it another way, that a

"trial becomes unfair if testimony thus accepted *[e.g.* as substantive proof] may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Shepard v. United States,* 290 U.S. 96, 102-103 (1933).

IV

As to the State's argument that our ineffective assistance of counsel claims *were not* addressed to the Ohio Court of Appeals, only a brief reference need be made to our Application for Rehearing filed with the appellate court. (See Appendix to this Reply.) Here, it was argued that the court's rather determined and arbitrary decision to salvage this conviction by imputing the cause for very serious flaws in this conviction to counsel for the petitioner created a substantial basis for the claim of ineffective assistance.

Since there is no chance this Court will *ignore* the fact that the incompetency of counsel issue here under consideration was *specifically* raised and *specifically* rejected by the Court of Appeals, the fact that the State would even try to finesse this Court into believing the issue was not raised in the appellate court (as was done at pp. 18 and 19 of the *Brief in Opposition)* is eloquent verification as to the quality of the various arguments made throughout the State's brief.

In any event, in our petition it was correctly represented that the argument was specifically addressed to the appellate court that certain of their findings, if valid, made it clear Thomas Lanci suffered from the lack of ineffective assistance of counsel (see *Petition,* p. 3). So postured, the assertion that the incompetency of counsel issue was not raised in the Court of Appeals is only valid if arguments made to an appellate court before their released opinion becomes final are meaningless at best.

CONCLUSION

This cause is easily regarded as one containing serious and substantial constitutional issues. Unavoidably, the issue here involving the ineffective assistance of counsel, especially when

coupled with the State Court's efforts to blame petitioner's trial counsel for the presence of numerous faults in this trial, is an issue that must eventually be resolved. The presence of this issue speaks most eloquently to the point that it should be resolved now and in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Reply was mailed to the office of John T. Corrigan, Cuyahoga County Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this day of June, 1981.

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Attorney for Petitioner

APPENDIX

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

CASE NOS. 39906 and 39907

(Filed October 6, 1980)

STATE OF OHIO,)
)
Plaintiff-Appellee,)
)
)
vs.)
)
)
THOMAS LANCI,)
)
and,)
)
KENNETH CIARCIA,)

Defendant-Appellants)

MOTION FOR RECONSIDERATION

In all deference to the Court, the decision announced herein should be Reconsidered for the various reasons argued below. Since some of our positions can possibly be viewed as an aggressive criticism of the Court's announced reasoning, it is hoped the Court will understand we have been guided by the perogative of counsel to vigorously assert with candor, however blunt, what we believe to be valid criticisms of judicial action with reference to our clients' liberty.

Here we begin with the observation that, in our judgment at least, this Court's unambiguous recognition that certain flaws occurred in the trial leading to these convictions. Given these correct determinations, it is most difficult to understand how the Court could still say, with any sense of conclusiveness of law or fact, that an affirmance here was nonetheless proper.

Our view, which clashes mightily with the Court's, is that once meaningful errors of the type we have here were credited with being present, there is absolutely no way (from the fastness of an appellate court) the pulsebeat of the courtroom can be perceived with sufficient reliability to enable this Court (or any court) to correctly determine that even had such errors *not* occurred, the jury's verdict would have nonetheless been the same.

In our view, this Court has simply closed its eyes to the probabilities of courtroom dynamics. For, once the trial court granted the Motion for Judgement of Acquittal on the Organized Crime count, as it should have been based on the flagrant lack of evidentiary support (*Jackson v. Virginia*, 443 U.S. 307 [1979]), the critical issues that emerged could not turn on whether it was the defense's responsibility to request that the trial judge take the appropriate action (with reference to the evidence admitted solely on the basis of the Organized Crime charge). Yet, this Court has satisfied itself that the responsibility for corrective action being taken rested with the defendants themselves to make a request. A further upshot of the Court's view is that Lanci and Ciarcia must personally bear the brunt of counsels' failure to request the action needed to dull the impact of the evidence the jury had no right to consider, since they were the ones vicitimized.

The fact that *no action* was taken by the trial court, who was responsible for much of this evidence even being admitted in the first place (since he failed to heed numerous objections and Motions and failed to grant the Motion for Acquittal at the close of the State's case - as he should have), in our judgment, is most critical. This is so because there is really no realistic way it can be said that these men were not prejudiced by the jury's consideration of this evidence *as substantive proof* of their guilt. Indeed, our ultimate position here is, once the trial court became convinced the Organized Crime charge had not been made, there was a manifest necessity for the granting of a mistrial and that counsel's failure to request such can be regarded as an instance of *ineffective assistance of counsel.*

Next, it was under segment VI of the Opinion that the Court's reasoning reaches its zenith. Here again, the Court imputes the blame for the lack of needed instructions on the appellants. In convincing itself this was the appropriate conclusion, the Court seemingly started its critical syllogism with what we regard to be a flagrant false premise. For the Record simply *does not* support the conclusion that "evidence of the other crimes, committed by the various principals involved by the evidence therein, was admissible against these appellants *under R.C. of Ohio*, §2945.59" *(Opinion*, p. 15).

Chief among the problems with the Court's ratiocinations are certain irrepressible considerations: (1) *most* of the evidence was not offered by the State on the basis of §2945.59 (see, *e.g.*, R 2199-2199/K); and (2) limiting instructions were specifically requested (R 3533) as were objections and motions to strike (R 3800-3801) made with reference to this testimony. In addition, the Record also fails to show that the bulk of this evidence was admitted for *any* of the collateral purposes indicated in the statute.

But, even this is not all. To simply conclude the evidence was admissible for a limited purpose and was only considered as substantive proof because counsel did not request the appropriate limiting instruction, only begs the question. That question, simply put, is: Did the jury's consideration of this evidence as substantive proof deprive these appellants of a fair trial? If the answer to that question turns (as this Court says it does), on the fact that defense counsel did not sufficiently object, then the conclusion is inescapable –these *appellants were denied the effective assistance of counsel.* This, in turn, is a consideration that must be deemed to have been rejected by this Court in the overall conclusion that no plain errors under Rule 52 are present anywhere in this case. As we see it, however, the position taken by the Court in this instance really punishing these appellants because their counsel did not do a vain act.

Then, under Section VIII, this Court (in a fashion somewhat comparable to elusive arguments made by the State to the trial court and to this Court) tells us that appellants were not tried for "the offense of conspiracy to murder Danny Greene" (*Opinion*, p. 17). This is certainly true, or should have been, since a count making that precise charge was dismissed before trial. And, we agree that under §2923.03 (A) (3) one can be found guilty of a substantive offense if it is shown he was a conspirator with reference to such offense *and* the offense was, in fact, committed in furtherance thereof during the period of his membership. *Pinkerton v. United States*, 328 U.S. 640, 645 (1946). But, see *United States v. Bertolotti*, 529 F. 2d 149 (2d Cir. 1975), and *United States v. Sperling*, 506 F. 2d 1323 (2d Cir. 1974).

It also is true that the State is entitled, in some cases, to any evidentiary advantages that could be developed under conspiracy concepts. However, more than a *prima facie* showing of a conspiracy need be shown as a condition precedent. To be sure, this *prima facie* notion conflicts with the best reasoned opinions in this area. See *United States v. Nixon*, 418 U.S., at 710, fn. 14, cited in *Appellants' Brief*, at p. 35 and *Ohio Rules of Criminal Evidence*, Rules 104 and 801 (D) (2) (E). In any event, the admissibility of evidence as being in furtherance of a conspiracy is a most complicated concept even for courts that have dealt with its ramifications for years. *United States v. Valencia*, 609 F. 2d 603 (2d Cir. 1979), and *United States v. Jackson*, 588 F. 2d 1046 (5th Cir. 1979).

This Court has totally disregarded the fact that the trial court did not make any preliminary determination that a conspiracy existed, nor did the trial court enumerate its members and its duration (which seemingly would have terminated with the death of Greene). So postured, it's simply blinking at reality to say the mere reference to conspiracy principles means those concepts were both understood and correctly applied.

At least this much is certain – nothing has been said by the prosecutor, or the trial court, to date to suggest they understood the relevant principles. So, for this Court to say they were correctly applied hardly makes sense.

Finally, in dealing with our sufficiency arguments (in segment X of the Opinion), the Court cornerstones its reasoning patterns by an almost ferverent reliance on evidence attributed to Ferritto, Aratari and Guiles (*id.*, at 21). Since it is true that the Court should view even this evidence in favor of the verdict where it is reasonable to do so, it hardly makes sense for us to tell the Court that the testimony of Aratari was impeached almost to the hilt by facts showing extreme motives, financial rewards, perjury and gross internal and external conflicts when compared with other *facts* and witnesses. The same is true of Ferritto and Guiles.

However, when concern is not merely the sufficiency of the evidence to withstand the test required by *Jackson v. Virginia*, 443 U.S. 634 (1979), and *Speigner v. Jago*, 603 F. 2d 1208 (6th Cir. 1979), very serious questions surface. Here we refer to the Court's views that various errors were harmless and did not deprive these appellants of a fair trial. Since the validity of any harmless error conclusion must be measured by the strength of the proof tending to show guilt, a sophisticated issue arises, one that must be viewed as relevant for this Court, since the claim is now being made that the appellant Lanci *did not have the effective assistance of counsel.* Proof positive this is so is submitted as being this Court's conclusion that certain errors occurred here because of the failures of his counsel.

CONCLUSION

The credibility of Aratari, Ferritto and Guiles was vital to the State's case. To the extent their credibility was bolstered or corroborated by inadmissible evidence, or evidence admitted for limited purposes unrelated to their credibility, or by the believability of their testimony with reference to facts and events that properly should have played no part in the trial itself, the errors involved could not possibly be harmless beyond a reasonable doubt.

Since it is not the perogative of Courts to usurpt the function of the jury and speculate whether, without the evidence wrongly admitted as substantive proof *and* even had trial counsel been effective, the verdict would have been the same; where, as here, prejudicial (or potentially prejudicial) evidence was improperly admitted and was augmented by the occurrence of other flaws, its harmful character cannot be determined by appellate court judges. Certainly, this must be so unless they resolve themselves into a jury and ignore the findings based on incompetent evidence and significant flaws.

For our part, the fact that considerable evidence was offered and admitted as substantive proof, and was so considered by the jury, really makes our point. Simply put, this Court *now* says "most" of this assailed evidence was admissible

for certain limited purposes, or would have been excluded if defense counsel had asked. Assuming this to be so, to penalize these appellants personally because their attorneys did not convince the trial court (despite counsels' correct objections to the evidence as offered), *to admit* some of this evidence as proof against their clients for such limited purposes really asks too much. *Cf., State v. Smith*,[1] 59 Ohio App. 194 (1977). The bottom line thus appearing is that this Court seems to be quite willing to offend the principle that appellate courts should not "consider evidence for any narrower purpose than that upon which the testimony was unquestionably offered and received at the trial." *United States v. Check*, 582 F. 2d 668, 683 (2d Cir. 1978). Also see *United States v. Brown*, 490 F. 2d 758, 763 (D.C. Cir. 1973), and *United States v. McClain*, 400 F. 2d 241 (D.C. Cir. 1971). The appropriateness of this idea here can only be augmented by references the *Check* decision makes to the rather sagacious remarks of Justice Cardozo in *Shepard v. United States*, 290 U.S. 96, 102-103 (1933). Here it was said, for a unanimous court (in a case that really focuses on an aspect of the evidence spectrum involved in this case) that where testimony was admitted for one purpose, the "trial becomes unfair if [such] testimony thus accepted may be used by an appellate court as though admitted for a different purpose unavowed and unsuspected." *Id.*, at 102-103.

Our position here can be analogized to that very recently expressed in *United States v. Cain*, 587 F. 2d 678 (5th Cir. 1979). In that case, the court concluded that where cogent evidence (if admissible at all) is admissible for a very limited purpose, the danger of the jury misusing such evidence is simply too great to leave the accused unprotected by a sufficient instruction. Also *see, United States v. McClain*, 440 F. 2d 241, at 246 (D.C. Cir. 1971).

[1] In *Smith*, contrary to the position taken by this Court, it was concluded:

> "Where the state presents testimony, without limitation, against an accused pertaining to his commission of other crimes, for which he has not been indicted, and the crimes bear no relevance to an element of the offense with which he is charged, the court's admission of such evidence is prejudicial error."

Hopefully, this Court has not allowed its, and the public's, natural antipathy toward "organized crime" to cloud its perception of due process in the notorious "Danny Greene Murder" trials. Hopefully too, this Court will not succumb to the notion that "ornithological specimens of identical plummage congregate," and for that reason rationalize that these appellants received the justice they deserved. For our part, we shall continue to subscribe to the principle that the rights of the very best among us are only as secure as those of the worse are protected.

What is required here is a Reconsideration of this cause, during the course of which the Court will also gauge the impact of our further contention that to the extent these appellants were prejudiced as a consequence of their trial counsel's failure to protect them in the instances noted by the Court, they were denied *the effective assistance of counsel.*

For all of these reasons, this Motion for Reconsideration should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Reconsideration was mailed to the offices of John T. Corrigan, Cuyahoga County Prosecutor, Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113, this day of October, 1980.

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